Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of:	)	
	)	
DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)	)	**Docket No. 21-CRB-0001-PR (2023-2027)**
	)	
	)	
	)	

WRITTEN DIRECT STATEMENT OF AMAZON.COM SERVICES LLC

Volume 3: Exhibits

October 20, 2021

Exhibits 1-9

Restricted

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Exhibit 10

DEPARTMENT OF JUSTICE

Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees

Washington, D.C.

August 4, 2016

The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) are "performing rights organizations" (PROs). PROs provide licenses to users such as bar owners, television and radio stations, and internet music distributors that allow them to publicly perform the musical works of the PROs' thousands of songwriter and music publisher members. These "blanket licenses" enable music users to immediately obtain access to millions of songs without resorting to individualized licensing determinations or negotiations. But because a blanket license provides at a single price the rights to play many separately owned and competing songs – a practice that risks lessening competition – ASCAP and BMI have long raised antitrust concerns.

ASCAP and BMI are subject to consent decrees that resolved antitrust lawsuits brought by the United States in 1941 alleging that each organization had unlawfully exercised market power acquired through the aggregation of public performance rights in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The consent decrees seek to prevent the anticompetitive exercise of market power while preserving the transformative benefits of blanket licensing. In the decades since the ASCAP and BMI consent decrees were entered, industry participants have benefited from the "unplanned, rapid and indemnified access" to the vast repertories of songs that each PRO's blanket licenses make available. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20 (1979).

At the request of ASCAP and BMI, in 2014 the Antitrust Division of the U.S. Department of Justice opened an inquiry into the operation and effectiveness of the consent decrees. In the course of the Division's investigation, the Division solicited two rounds of public comments regarding the consent decrees and met with dozens of industry stakeholders. The Division evaluated during its investigation whether various modifications to the consent decrees

requested by stakeholders were necessary to account for changes in how music is consumed today. During the discussions surrounding these requested modifications, it became apparent that industry participants had differing understandings of whether the PROs' licenses provide licensees the ability to publicly perform, without risk of copyright infringement, all of the works in each of the PROs' repertories. The requests for modifications therefore required the Division to examine the question of whether the consent decrees obligate ASCAP and BMI to offer "full-work" licenses.

The Division has now concluded its investigation and has decided not to seek to modify the consent decrees. As discussed in detail below, the consent decrees, which describe the PROs' licenses as providing the ability to perform "works" or "compositions," require ASCAP and BMI to offer full-work licenses. The Division reaches this determination based not only on the language of the consent decrees and its assessment of historical practices, but also because only full-work licensing can yield the substantial procompetitive benefits associated with blanket licenses that distinguish ASCAP's and BMI's activities from other agreements among competitors that present serious issues under the antitrust laws. Moreover, the Division has determined not to support modifying the consent decrees to allow ASCAP and BMI to offer "fractional" licenses that convey only rights to fractional shares and require additional licenses to perform works. Although stakeholders on all sides have raised some concerns with the status quo, the Division's investigation confirmed that the current system has well served music creators and music users for decades and should remain intact. The Division's confirmation that the consent decrees require full-work licensing is fully consistent with preserving the significant licensing and payment benefits that the PROs have provided music creators and music users for decades.

The Division recognizes that its views of the consent decrees' requirements and the nature of the PROs' licenses are not shared or supported by all industry participants. This statement seeks to explain the bases for the Division's determination and describe why an express recognition that ASCAP and BMI do currently and must continue to offer full-work licenses should not meaningfully disrupt the status quo in the licensing of public performance rights. As discussed below, the Division encourages the industry to use the next year, during which the Division will forgo enforcement of the full-work licensing requirement, to transition to a common understanding regarding the scope of the ASCAP and BMI licenses. This period should allow stakeholders to resolve any practical challenges relating to complying with the full-work licensing requirement, including the identification of songs that can no longer be included in ASCAP's or BMI's repertories because they cannot be offered on a full-work basis or the voluntary renegotiation of contractual agreements between co-owners to allow ASCAP or BMI to provide a full-work license to the song.

The Division has also decided that it will not at this time support other proposed decree modifications. The most significant of the proposed modifications was a proposal supported by ASCAP, BMI, and music publishers to allow music publishers to "partially withdraw" from ASCAP and BMI, thereby prohibiting the PROs from licensing the withdrawing publishers' music to digital services such as Pandora or Spotify. The lack of industry consensus as to whether the PROs offer full-work licenses creates too much uncertainty to properly evaluate the competitive impact of allowing partial withdrawal, a necessary predicate to a determination that a decree modification to allow partial withdrawal would be in the public interest.

This statement proceeds as follows. Section I outlines important features of the PROs, music licensing in the United States, and the history of antitrust enforcement with respect to the

PROs. Section II briefly describes significant areas of agreement regarding the important role ASCAP and BMI play in the U.S. music ecosystem, focusing in particular on the procompetitive benefits that industry participants recognize the PROs offer. Section III explains the Division's conclusion that the consent decrees require full-work licensing, and Section IV discusses the Division's determination that the decrees should not be modified to allow fractional licensing. Section V provides the Division's views regarding other proposed modifications to the consent decrees proposed by stakeholders. Section VI discusses the Division's decision to provide an opportunity over the next year for ASCAP, BMI, and other stakeholders to develop a shared understanding that ASCAP's and BMI's licenses provide the ability to perform all of the works in their respective repertories. Section VII identifies practices industry participants may find useful in complying with the consent decrees' full-work licensing requirements while maintaining most current licensing practices. Finally, Section VIII concludes by addressing the possibility of broader legislative reform of public performance licensing.

I. Background

Purpose and Operations of ASCAP and BMI. In order to publicly perform musical works, businesses must obtain permission from copyright holders. Every day, hundreds of thousands of restaurants, radio stations, online services, television stations, performance venues, and countless other establishments publicly perform musical works. These music users have historically relied in large part on PROs to provide licenses to perform these works. PROs pool the copyrights held by their composer, songwriter, and publisher members or affiliates and collectively license those rights to music users. In the United States, ASCAP and BMI are the largest PROs and are responsible for licensing an overwhelming majority of works. A third PRO, SESAC, has historically also controlled a significant but much smaller repertory. In recent years, a fourth PRO called Global Music Rights, also controlling a collection of songs

considerably smaller than ASCAP's or BMI's, entered the marketplace. ASCAP and BMI, as well as the smaller PROs, license music predominantly through "blanket licenses," which provide access to each organization's entire repertory without regard for what specific songs are used or how often the songs are played.

Individual songwriters, composers, and publishers that participate in a PRO execute an agreement with that PRO to do so. Today, a songwriter joins ASCAP by executing a membership agreement in which it grants to ASCAP the right to license any work that "may be written, composed, acquired, owned, published, or copyrighted by the owner, alone, jointly or in collaboration with others . . . ." ASCAP Writer Agreement, *available at* http://www.ascap.com/~/media/files/pdf/join/ascap-writer-agreement.pdf. The ASACP writer further warrants "that there are no existing assignments or licenses, direct or indirect, of non-dramatic performing rights in my musical works, except to or with the publisher(s)" that would restrict ASCAP's ability to license under the terms of the grant of rights. *Id.* Similarly, a songwriter affiliating with BMI grants to BMI the right to license non-dramatic public performances of "all musical compositions . . . composed by [the member] alone or with one or more co-writers" and promises that "no performing rights in [these compositions] have been granted to or reserved by others except as specifically set forth therein in connection with Works heretofore written or co-written by [the author]." BMI Writer Agreement, *available at* http://www.bmi.com/forms/affiliation/bmi_writer_kit.pdf.

The ASCAP and BMI Consent Decrees. The United States first brought price-fixing charges against ASCAP more than 80 years ago and, in 1941, the United States resolved its civil antitrust lawsuits when it and ASCAP agreed to a civil consent decree that has twice been significantly amended, most recently in 2001. The United States and BMI entered into a consent

decree in 1941 to resolve similar concerns, and most recently amended the decree in 1994. Both organizations have also been subject to numerous private antitrust lawsuits, one of which resulted in an important Supreme Court decision, *Broadcast Music, Inc. v. CBS, Inc.* In *BMI*, the Supreme Court acknowledged that ASCAP's and BMI's blanket licenses raised significant antitrust concerns because they pool works that in some circumstances would be substitutes (and thus competitors) for some music users. 441 U.S. at 10. The court emphasized, however, that the blanket licenses also provided valuable benefits that no individual rightsholder could match, including the "immediate use of covered compositions, without the delay of prior individual negotiations." *Id.* at 21-22. In light of these benefits, and recognizing the value of the consent decrees that restrained the ability of ASCAP and BMI to exercise their market power, the Court concluded that the PROs' blanket licensing practices did not constitute per se illegal price fixing. *Id.* at 16-24.

Consistent with the Supreme Court's guidance, the consent decrees seek to preserve the transformative benefits of blanket licensing, including the "immediate use" of the works within the PROs' repertories. To this end, the ASCAP consent decree requires ASCAP to offer users a "license to perform *all the works in the ASCAP repertory*." ASCAP Consent Decree § VI (emphasis added). The BMI consent decree similarly requires BMI's licenses to provide music users with access to its "repertory," which includes "those compositions, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense." BMI Consent Decree § II(C). The decrees also provide for the creation of two separate "rate courts," to which either music users or the PROs may resort if the two sides are unable to reach a mutually agreeable price for a license. *See* ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

Existence of Multi-Owner Works. Many musical works have multiple authors. Under the copyright law, joint authors of a single work are treated as tenants-in-common, so "[e]ach co-owner may thus grant a nonexclusive license to use the entire work without the consent of other co-owners, provided that the licensor accounts for and pays over to his or her co-owners their pro-rata shares of the proceeds." UNITED STATES COPYRIGHT OFFICE, VIEWS OF THE UNITED STATES COPYRIGHT OFFICE CONCERNING PRO LICENSING OF JOINTLY OWNED WORKS (2016), at 6, *available at* http://www.copyright.gov/policy/pro-licensing.pdf. Copyright holders may, however, depart from the default rules under the Copyright Act. *See generally id.* ("[T]he default rules are only a 'starting point,' with collaborators . . . free to alter this statutory allocation of rights and liabilities by contract.") (citations and quotations omitted). There are therefore at least two possible frameworks under which PROs may license works with multiple owners belonging to multiple PROs. Under a "full-work" license, each PRO would offer non-exclusive licenses to the work entitling the user to perform the work without risk of infringement liability. Under a "fractional" license, each PRO would offer a license only to the interests it holds in a work, and require that the licensee obtain additional licenses from the PROs representing other co-owners before performing the work.

Division Review of the Consent Decrees. In 2014, the Antitrust Division opened an investigation into potential modifications of the consent decrees requested by various stakeholders. The Division issued a public request for comments and received more than 200 responses, primarily from industry stakeholders such as composers, publishers, and music licensees, as well as from advocacy groups. (The solicitation and responses are available here: https://www.justice.gov/atr/ascap-bmi-decree-review.) The PROs proposed three significant modifications: first, to allow publishers to partially withdraw works from the PROs, thereby

preventing the PROs from licensing such works to digital music users; second, to streamline the process by which fee disputes are resolved; and, third, to permit the PROs to offer licenses to rights other than the public performance right, particularly for users who also need a performance license. Music users proposed additional changes, in particular to promote increased transparency and clarify rules surrounding "licenses-in-effect," *i.e.*, how withdrawals from a repertory affect the scope of licenses granted by the PROs.

As the Division considered the implications of these proposed changes, particularly partial withdrawal, stakeholders on all sides raised questions about the treatment of multi-owner works. Music users claimed that the PROs had always offered licenses to perform all works in their repertories, whether partially or fully owned, and urged modifications to confirm their view. Rightsholders, by contrast, claimed that the PROs had never offered full licenses to perform fractionally owned works, and also urged modifications to confirm their view. ASCAP and BMI did not concede that the existing consent decrees prohibited fractional licensing, but proposed that their consent decrees be modified to explicitly allow them to offer fractional licenses. Historically, the industry has largely avoided a definitive determination of whether ASCAP and BMI offered full-work or fractional licenses because the vast majority of music users obtain a license from ASCAP, BMI, and SESAC and pay those PROs based on fractional market shares. These practices made it unnecessary, from both the user and rightsholders perspective, to sort out whether the ASCAP and BMI licenses are full-work or fractional; users have held licenses that collectively cover all works and rightsholders have been paid for their works by their own PROs without having to worry about accounting. However, recent events, including the Division's review, have made it necessary to confront the question.

The question of whether ASCAP and BMI licenses are or should be fractional or full-

work has significant implications for the PROs, their members, and their licensees. If PROs offer fractional licenses, a music user, before performing any multi-owner work in a PRO's repertory, would need a license to the fractional interests held by each of the work's co-owners. A full-work license from a PRO, on the other hand, would provide infringement protection to a music user seeking to perform any work in the repertory of the PRO.

In light of the industry's conflicting understandings and the implications for any potential modification, the Division solicited a second round of public comments in 2015 and received more than 130 responses. (The solicitation and responses are available here: https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015.) The Division subsequently met and spoke with dozens of industry stakeholders.

II. There is broad consensus that ASCAP and BMI as currently constituted fill important and procompetitive roles in the music licensing industry.

Despite strong areas of disagreement among industry stakeholders as to issues raised in the Division's solicitations of public comments, there is broad consensus that ASCAP and BMI provide a valuable service to both music users and PRO members. The PROs allow music users to obtain immediate access through licenses that protect them from copyright infringement risk to millions of works controlled by the hundreds of thousands of songwriters, composers, and publishers that have contributed songs to the PROs.

Music creators also benefit from the PROs' licensing practices. For many songwriters and composers, affiliating with a PRO and contributing their works to the PRO's repertory provides the only practical way of licensing their works. While direct licensing to individual music users always remains available as an alternative for music creators, individual music creators would often find it infeasible to themselves enter into licenses with all of the bars, restaurants, radio stations, television stations, and other music users to which ASCAP and BMI

license. Even where direct negotiations are possible, users and creators may find PRO licenses more efficient. Moreover, the PROs have developed valuable expertise in distributing revenues among the hundreds of thousands of copyright holders, and creators generally trust that ASCAP and BMI will fairly distribute licensing proceeds.

There is also significant agreement that aspects of the manner in which ASCAP and BMI have historically fulfilled their licensing responsibilities benefit both creators and music users. Upon request, ASCAP and BMI have offered users immediate licenses to perform the works in their repertories. (As discussed elsewhere, there is dispute about exactly what these licenses mean for partially owned works.) Most large music users have obtained licenses from ASCAP, BMI, and SESAC. ASCAP and BMI have charged fees based roughly on their respective market share accounting for partial interests in the songs in their repertories. ASCAP and BMI have then distributed these fees to their own members, again based on the ownership each member has in particular songs. Many music creators, who often affiliate with the PRO of their choice early in their careers, value their relationship with their PRO and like receiving payments for the public performance of their works directly from their chosen PRO.

III. The consent decrees require full-work licensing.

The Division's review has made clear that the consent decrees require ASCAP's and BMI's licenses to provide users with the ability to publicly perform, without risk of infringement liability, any of the songs in the respective PRO's repertory. This determination is compelled by the language and intent of the decrees and years of interpretations by federal courts. First, the plain text of the decrees cannot be squared with an interpretation that allows fractional licensing: the consent decrees require ASCAP to offer users the ability to perform all "works" in its repertory and BMI's licenses to offer users the ability to perform all "compositions" in its repertory. ASCAP's and BMI's licenses have for decades purported to do exactly that. *See, e.g.*,

BMI Music License for Eating & Drinking Establishments, *available at* http://www.bmi.com/forms/licensing/gl/ede.pdf ("BMI grants you a non-exclusive license to publicly perform at the Licensed Premises *all of the musical works* of which BMI controls the rights to grant public performances during the terms.") (emphasis added).

Moreover, only full-work licensing achieves the benefits that underlie the courts' descriptions and understandings of ASCAP's and BMI's licenses. For example, the Supreme Court explained that the ASCAP and BMI blanket license "allows the licensee *immediate use* of covered compositions, *without the delay of prior individual negotiations*, and great flexibility in the choice of musical material." *BMI*, 441 U.S. at 21-22 (emphasis added). In so doing, they provide "unplanned, rapid, and indemnified access" to the works in ASCAP's and BMI's repertories. *Id.* at 20. If the licenses were fractional, they would not provide *immediate* use of covered compositions; users would need to obtain additional licenses before using many of the covered compositions. And such fractional licenses would *not* avoid the delay of additional negotiations, because users would need to clear rights from additional owners of fractional interests in songs before performing the works in the ASCAP and BMI repertories. Similarly, the Second Circuit has held that ASCAP is "required to license its entire repertory to all eligible users," and that the repertory includes "all works contained in the ASCAP repertory." *Pandora Media, Inc. v. ASCAP*, 785 F.3d 73, 77-78 (2d Cir. 2015) (emphasis removed). The Second Circuit rejected arguments that this decree requirement conflicted with copyright law, noting that "[i]ndividual copyright holders remain free to choose whether to license their works through ASCAP." *Id.* at 78. The logic of the Second Circuit's decision applies to BMI as well.

Accordingly, the consent decrees must be read as requiring full-work licensing. ASCAP and BMI can include in their repertories only those songs they can license on such a basis.

These songs include works written by a single songwriter who is a member of the PRO; works written by multiple writers, all of whom are members of the PRO; and works written by multiple writers, one or more of whom are members of the PRO and possess the right under the default tenancy in common or pursuant to other arrangements among the songwriters to grant a full-work license. Moreover, nothing in this interpretation contradicts copyright law. To the extent allowed by copyright law, co-owners of a song remain free to impose limitations on one another's ability to license the song. Such an action may, however, make it impossible for ASCAP or BMI – consistent with the full-work licensing requirement of the antitrust consent decrees – to include that song in their blanket licenses.

IV. The Division has determined that modification of the consent decrees to permit fractional licensing by ASCAP and BMI would not be in the public interest.

The Division also considered ASCAP's and BMI's requests to modify the decrees to permit fractional licensing. Based on the public comments and meetings and communications with stakeholders, the Division has concluded that it would not be in the public interest to modify the ASCAP and BMI consent decrees to permit ASCAP and BMI to offer fractional licenses.

Modifying the consent decrees to permit fractional licensing would undermine the traditional role of the ASCAP and BMI licenses in providing protection from unintended copyright infringement liability and immediate access to the works in the organizations' repertories, which the Division and the courts have viewed as key procompetitive benefits of the PROs preserved by the consent decrees.

Allowing fractional licensing would also impair the functioning of the market for public performance licensing and potentially reduce the playing of music. If ASCAP and BMI were permitted to offer fractional licenses, music users seeking to avoid potential infringement

liability would need to meticulously track song ownership before playing music. As the experience of ASCAP and BMI themselves shows, this would be no easy task. Today, in the context of compensating song owners, ASCAP, BMI, and other PROs must track and rely on song ownership information they possess to determine to whom to distribute funds collected from music users. But even with their years of experience in finding and compensating song owners and their established relationships with music creators, the PROs often do not make distributions until weeks or months *after* a song is played, and even then do so imperfectly. The difficulties, delays, and imperfections that are tolerated in the context of PRO payments would prove fatal to the businesses of music users, who need to resolve ownership questions *before* playing music to avoid infringement exposure.

A comparison between the licensing of public performance rights and the licensing of synchronization rights further illustrates the problem faced by music users who rely on PRO licenses. Producers of movies or television programming have traditionally entered separate synchronization licenses with each owner of a fractional interest in a song the producer seeks to include in his or her television show or movie, generally on a song-by-song basis. Unlike many ASCAP and BMI licensees, the producer can identify a song before it is used and has the ability to substitute to a different song if the producer cannot reach agreements for the synchronization rights with each of the song's fractional owners. Indeed, it is not uncommon for a producer to fail to obtain synchronization licenses from all of a song's fractional owners and to turn instead to a different song. In contrast, music users publicly performing music are often using music selected by others – for example, by the producer who placed a song in a television show or the disk jockey selecting songs for the radio (which may be played in a bar or restaurant that cannot control the music chosen). These users rely on blanket licenses to allow them to perform music

without first determining whether they have cleared the rights in a work. Unlike a movie or television producer, these music users cannot switch to a different song if they lack the rights to publicly perform a song. Their only recourse under a fractional licensing regime, under which their PRO blanket licenses leave them exposed to infringement liability, might be to simply turn off the music.

The problems inherent in allowing ASCAP and BMI to engage in fractional licensing would be exacerbated by the absence of a reliable source of data on song ownership to which music users could turn to identify whether they possess rights to perform a song or from whom they could seek a license. The Division's investigation uncovered that no such authoritative information source exists today, even for existing works, and, further, that songwriting credits for new releases may not be fully established until after the songs have been released. If music users cannot rely on ASCAP and BMI blanket licenses to avoid infringement exposure, they are likely to avoid playing songs – including new releases – that they are not confident they possess the right to perform. Nor are music users positioned to lead the creation of a comprehensive and reliable database of song ownership information. To the extent such a database could be created, songwriters, music publishers, and PROs have much greater access to the information necessary to do so.

Finally, allowing fractional licensing might also impede the licensed performance of many songs by incentivizing owners of fractional interests in songs to withhold their partial interests from the PROs. A user with a license from ASCAP or BMI would then be unable to play that song unless it acceded to the hold-out owner's demands, providing the hold-out owner substantial bargaining leverage to extract significant returns. The result would be a further reduction in the benefits of the ASCAP and BMI licenses and the creation of additional

impediments to the public performance of music.

For all of these reasons, the Division believes that modifying the consent decrees to permit fractional licensing would not be in the public interest. Although PROs, songwriters, and publishers suggested there are problems associated with full-work licensing, especially the creation of works that would be unlicensable by the PROs, the Division believes that the potential costs associated with these concerns are far outweighed by the benefits of full-work licensing. In particular, the Division believes, as further detailed in Section VII below, that songwriters possess several options that would allow PROs to continue to license their works as well as allow those songwriters to continue to be paid by the PRO of their choice.

V. The Division has also determined that other modifications to the consent decrees would not be appropriate at this time.

Industry stakeholders also proposed to the Division that the consent decrees be modified in other ways. The most significant of the proposed modifications, and the one that received the greatest attention among industry stakeholders, was that the consent decrees be modified to allow PRO members to "partially withdraw" rights and thereby prevent the PROs from granting licenses that include those rights to certain users (in particular, digital music services) but not to other music users. The impact of such partial withdrawal by music publishers turns significantly on the question of whether the PROs offer full-work or fractional licenses. If the PROs were to offer fractional licenses, then a digital user would be unable to rely on a license from the PRO to perform any work in which a partially withdrawing publisher owned any fractional interest. If the PROs were to offer full-work licenses, the effect of the partial withdrawal would be more modest because the PRO could continue to license many songs in which members that did not partially withdraw controlled an interest (and possessed the ability to allow the PRO to license the song on a full-work basis). Although the Division interprets the consent decrees to require

full-work licensing, the Division recognizes that some rightsholders have not shared this interpretation, making a determination of the effect of partial withdrawal sufficiently speculative at this point that the Division cannot determine whether modification to permit partial withdrawal would be in the public interest.

Moreover, as discussed immediately below, the Division recognizes that the sharply conflicting views that many industry stakeholders have had on the question of whether the PROs do or must offer full-work licenses will necessitate some period of adjustment in the industry as it moves to a common understanding of the scope of the PRO licenses. The Division believes that seeking modifications to the consent decrees – to permit partial withdrawal or in other ways suggested by some in the industry – during this uncertain period could complicate the industry's move to a shared approach with full clarity for all industry participants as to the rights conveyed by the PROs' licenses. For this reason as well, the Division has determined that it would not be in the public interest to modify the consent decrees at this time, but remains open to considering these modifications at a later date.

VI. Assuming ASCAP and BMI proceed in good faith, the Division will forbear for one year from any enforcement action based on any purported fractional licensing by ASCAP or BMI.

With the clarification provided by this statement, the Division believes it is essential that the industry now move towards a shared understanding that ASCAP and BMI offer full-work licenses that entitle music users to perform, without risk of infringement, all of the works in each PRO's repertory. In light of the different views expressed by stakeholders about existing practices, the Division is cognizant that any move to this common understanding will require adjustment by some market participants. To facilitate this adjustment and ease the transition to a common understanding, the Division will not take any enforcement action based on any purported fractional licensing by ASCAP and BMI for one year, as long as ASCAP and BMI

proceed in good faith to ensure compliance with the requirements of the consent decrees. During this year, to the extent doubt exists about the PROs' ability to license specific works, the Division expects that ASCAP and BMI will take the steps necessary to eliminate such uncertainty, including obtaining from songwriter and publisher members the assurances they need and, to the extent necessary, removing works from their licenses if they cannot be offered on a full-work basis. In order to facilitate this transition, the Division strongly urges industry stakeholders to explore means of further promoting transparency, including transparency regarding the identity of rightsholders from which music users may license any works they cannot obtain from ASCAP and BMI.

VII. While industry participants will and should continue a long history of devising creative solutions, the Division has identified certain guidelines and practices that may be useful as the industry moves towards such a shared understanding on full-work licensing.

The Division is confident that the transition to a common understanding need not disrupt the significant efficiencies in both licensing and payment that ASCAP and BMI have provided for years. To help ensure this result, the Division discusses below certain practices that would permit both rightsholders and users to benefit from the continued use of the licenses offered by ASCAP and BMI in a manner that is not markedly different from the status quo. However, these examples are not intended to be exhaustive, and industry participants will undoubtedly identify additional ways to accomplish this transition without meaningful disruption or movement away from current practices. The Division remains open to additional solutions and, to the extent that there is uncertainty about alternative proposals, the Division is committed to working with stakeholders to review them and provide feedback, especially during the next year of transition.

- *Co-owners of a song who are members of different PROs can continue to have their songs included in one or more PROs' full-work licenses and continue to be*

paid based on their fractional ownership. Co-owners can do so in at least two ways. Each co-owner can grant his or her PRO a non-exclusive right to license public performances of the song (as is the default for a joint work), but can agree that each owner will collect through his or her own PRO. For example, if an ASCAP member co-writes a song with a BMI member, each writer may continue to license the work through his or her chosen PRO and receive payments from that PRO. The Division believes this approach is consistent with historical practice. Alternatively, if co-writers have a contract that prevents each co-owner from licensing the song on a full-work basis and those co-owners are members of different PROs, the co-owners may amend their contract either to revert to the default rule or to choose a single PRO as the licensing agent for the song, and agree on a manner to distribute revenue from that work. For example, for a song co-written by one ASCAP member and one BMI member, the co-writers might designate the ASCAP member to collect all revenues from the licensing of public performance rights to the song and require that the ASCAP member distribute a share of the revenues to the BMI member. Under these circumstances, the song would not be included in BMI's repertory. Of course, the obligation under the consent decrees that ASCAP and BMI offer full-work licenses binds only the two PROs and not any individual songwriter. Co-writers of songs remain free to split up their joint rights by contract in a way that makes their songs unlicensable by ASCAP or BMI. This discussion merely seeks to illuminate what rightsholders can do if they wish to facilitate the PROs' ability to license their songs consistent with the requirements of the consent decrees. If co-owners decline to grant

ASCAP and/or BMI the right to license the song on a full-work basis, the PROs will not be able to license that song. Co-owners of such works can use the next year to determine whether they want their songs available for licensing on a full-work basis by ASCAP and BMI and, if so, whether their songwriting arrangement will need to be modified to accommodate that goal.

- *ASCAP's and BMI's full-work licenses include songs granted to them on that basis by members and those licensable by other agreement.* In the process of clarifying the works that ASCAP and BMI are able to continue to license under a full-work licensing requirement, the PROs may remind their members that the members made grants of rights to their PRO to license all works of which a member is a partial or complete owner and warranted that there were no other agreements that would prevent licensing on the basis described in the grant of rights. The PROs' members can work with co-writers over the next year to make a specific determination whether they want their works to continue to be available to music users under multiple PROs' licenses, a single PRO's license, or through other vehicles. Additionally, ASCAP and BMI may consider the possibility of entering into reciprocal agreements with each other confirming that each PRO may license on a non-exclusive basis songs jointly owned by members of the other PRO and confirming that in the ordinary course members will continue to be paid by their chosen PRO.
- *Full-work licensing and fractional payments are not incompatible.* Fractional payments within the context of full-work licensing benefit creators by removing impediments to commercial and artistic choice. The requirement to offer full-

work licenses need not require a departure from fractional payments both to and from ASCAP and BMI. For example, co-owners of a work who are members of different PROs may each offer non-exclusive licenses through their respective PROs while relying on payments from their own PRO in lieu of any obligation to account to one another. In this example, the user might be said to have multiple, full licenses to the same song, but to have paid only a portion of the full value for each of these licenses. A system of fractional payments, therefore, also benefits users by assuring they are not overpaying for buying multiple full-work licenses for co-owned songs.

- *Flexible fee structures may promote efficient licensing and payments.* Users who have historically obtained licenses from multiple PROs and who paid each of those PROs based in part on each organization's ownership-weighted market share should continue to do so. In the unlikely event that a user sought to depart from this practice by relying on a single PRO license as a basis to perform all co-owned works, the Division anticipates that the user would see an increase in the license fee corresponding to that portion of the works it is no longer paying for through a different PRO, as well as an additional administrative fee to cover the PRO's costs associated with the license (which may include the cost of contracting with other PROs to make payments to those PROs' members). ASCAP and BMI may offer pricing that explicitly adjusts based on the other PRO licenses obtained (or not obtained) by a particular user. (Existing licenses, in contrast, should generally not need to be re-priced.) Some songwriters have expressed concern about full-work licensing leading to lower payments or to

payments being made by a PRO of which they are not a member. However, the Division expects that in most if not all circumstances the higher price a user would face for a single license to play music it previously cleared through multiple PROs will deter users from deviating from current licensing practices and producing the results that concern songwriters.

VIII. The consent decrees remain vital to an industry that has grown up in reliance on them. But the consent decrees are inherently limited in scope, and a more comprehensive legislative solution may be possible and preferable.

During the course of its review, the Division considered whether the ASCAP and BMI consent decrees continue to serve the purposes for which they were put in place in 1941. After carefully considering the information obtained during its investigation, the Division has concluded that the industry has developed in the context of, and in reliance on, these consent decrees and that they therefore should remain in place. However, the Division recognizes the incongruity in the oversight over the licensing of performance rights and other copyrights in compositions and sound recordings and believes that the protections provided by the consent decrees could be addressed through a legislative solution that brings performance rights licensing under a similar regulatory umbrella as other rights. The Division encourages the development of a comprehensive legislative solution that ensures a competitive marketplace and obviates the need for continued Division oversight of the PROs.

Exhibit 11

"Selective Withdrawal" of New Media Rights from ASCAP and BMI

August 9, 2019

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The National Music Publishers' Association ("NMPA") is pleased to submit these comments in response to the June 5, 2019 request for public comments by the Department of Justice ("DOJ") regarding its review of the consent decrees in United States v. American Society of Composers, Authors and Publishers ("ASCAP"), 41 Civ. 1395 (S.D.N.Y.) and United States v. Broadcast Music, Inc. ("BMI"), 64 Civ. 3787 (S.D.N.Y.). These comments focus on whether copyright owners should be permitted to "selectively withdraw" digital public performance rights from the repertories of ASCAP and BMI. Presently, copyright owners may not selectively withdraw from ASCAP or BMI in light of judicial decisions interpreting the language of the consent decrees. However, there is no antitrust enforcement-based reason supporting this prohibition, which harms songwriters and music publishers; amounts to an anti-free market regulation that is inconsistent with DOJ policy, antitrust law, and copyright law; and is not necessary to serve any interests of the consent decrees.

The NMPA is the principal trade association representing the U.S. music publishing industry. Its mission is to promote and advance the interests of music's creators, and its members include companies and individuals of all catalog and revenue sizes. The NMPA believes that free, unregulated music licensing markets ensure that copyright owners reap the fair value of their intellectual property rights and have economic incentives to write more music.[1] Free markets also guarantee consumers the widest variety of music options.

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[1] *See* Federal Trade Commission and DOJ, *Excessive Prices* (Oct. 17, 2011) at ¶ 9, *available at* https://www.justice.gov/sites/default/files/atr/legacy/2014/05/30/278823.pdf ("[A] market pricing mechanism promotes the most efficient allocation of resources in a free market economy, and this same efficient allocation of resources is the bedrock of antitrust policy and enforcement in the U.S. . . .").

I. Summary of Argument.

To the extent the ASCAP and BMI consent decrees continue to exist, they should be modified to permit copyright owners to withdraw digital rights from the ASCAP and BMI repertories if they so choose. This modification, to which we refer herein as "selective withdrawal," would empower copyright owners to decide whether to license their works directly to digital service providers ("DSPs") or whether to continue to license to such music users through the performance rights organization ("PRO") system. Increased direct licensing between music publishers and DSPs would be efficient and procompetitive, not to mention fair to music publishers and songwriters. Today, owners of musical works are hamstrung in their ability to reap the market value of their intellectual property because DSPs can take advantage of regulatory consent decree provisions never meant for them. There is no legitimate antitrust enforcement-based reason to continue to regulate music publishers and songwriters in this manner.

Selective withdrawal is consistent both with the fact that the right of public performance is not regulated as a matter of copyright law, and with antitrust law principles, which generally favor direct licensing over collective licensing. By contrast, the prohibition on selective withdrawal is an unfair de facto regulation that, without any countervailing antitrust enforcement justification, constrains the ability of copyright owners to exercise their property rights vis-à-vis DSPs. DSPs are much larger and more powerful than the music licensees who were the intended beneficiaries of the ASCAP and BMI consent decrees. Furthermore, the music publishers and songwriters who are today regulated by the prohibition on selective withdrawal were never alleged to have violated antitrust laws in the first place.

Until the recent emergence of digital streaming as the dominant form of music consumption, ASCAP and BMI licensed performance rights primarily to a diffuse array of "traditional" businesses that play music for profit: radio and TV stations, and brick-and-mortar businesses like clubs, concert venues, bars, and restaurants.[2] In this traditional licensing context, the PRO blanket licensing system generates procompetitive benefits for both rightsholders and licensees. Without PRO blanket licensing, most music publishers and songwriters would find it virtually impossible to enforce their rights against these types of users, and many of the users, especially small businesses, would find it virtually impossible to obtain the licenses needed to play music lawfully. The consent decrees, which were put in place in 1941, were designed to enable ASCAP and BMI to continue to issue blanket licenses to traditional users while reducing what the DOJ saw as a threat of anticompetitive harm posed by collectives that possessed significant market power and bargaining leverage.

But the marketplace dynamics that led to the PRO blanket licensing system are not the same with respect to DSPs, and copyright owners therefore should be permitted to choose whether to license their digital performance rights through a PRO or whether instead to license them directly to users. In the last 5-10 years, the economic and technological landscape of the music marketplace has changed dramatically such that today, a very large number of public performances of musical works occur via a small handful of digital streaming services. The music distribution market today is dominated by companies that are exponentially larger than the music publishing industry as a whole,

[2] We refer to these businesses as "traditional" licensees to distinguish them from digital licensees.

including Google, Amazon, and Apple, each of which has the resources and the size to negotiate licenses directly with copyright owners and often does so. In unregulated musical copyright areas – such as, for example, relating to lyrics reproduction rights or synchronization – digital users routinely negotiate with copyright owners for full-catalog licenses without the involvement of a PRO-like middleman. It is only for public performance rights that, for purely historical reasons unrelated to present-day antitrust justifications, these same companies can take advantage of consent decree provisions and avoid having to negotiate in a free market. For instance, if one of these DSPs is unable to negotiate an ASCAP or BMI license at a price it deems favorable, it can bring ASCAP or BMI to "rate court," forcing songwriters and publishers to foot ASCAP's or BMI's litigation costs. This is not the case in other, unregulated areas.

The players in the concentrated DSP market do not need the ASCAP and BMI consent decrees to protect them from music publishers and songwriters. They should have no entitlement to purchase performance licenses from regulated licensing collectives, as opposed to from rightsholders directly in the free market. The right of public performance is not regulated by copyright law, and selective withdrawal would allow music publishers, who were never subject to antitrust enforcement actions, to exercise that right.

We are aware that ASCAP and BMI have proposed to the DOJ that their consent decrees should be amended in ways that are unrelated to selective withdrawal. We are studying the other changes requested by ASCAP and BMI and consulting with industry stakeholders on them. These comments argue only for selective withdrawal, which is a

separate issue that should be considered by the DOJ regardless of what other actions it may take in respect of the ASCAP and BMI consent decrees.

II. Background.

A. The public performance right.

Every recorded song begins with a musical composition, the copyright in which is owned by a songwriter and/or music publisher.[3] United States law grants the owner of such a copyright several exclusive rights, including the right to perform the song publicly.[4] To lawfully perform a song in public – that is, to stream it online or play it on the radio, on television, or in a business establishment – one must first obtain a license from the copyright owner(s).

Importantly, the right of public performance is not regulated for musical compositions. This stands in contrast with regulation of other aspects of musical copyrights, including the right to "mechanically" reproduce copyrighted musical works.[5] Any discussion of selective withdrawal must account for the fact that Congress knows

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[3] 17 U.S.C. § 201.

[4] 17 U.S.C. § 106(4); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4 (1979) ("[s]ince 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit") ("*BMI v. CBS*").

[5] 17 U.S.C. § 115.

how to regulate copyright holders and has done so, but the right of music publishers and songwriters to publicly perform their music is not regulated.

B. Performing rights organizations.

For historical and practical reasons, the performance rights to most music performed in the United States are administered by PROs. PROs aggregate public performance rights in musical compositions and license them collectively to the thousands of users who want to play music in public. Songwriters typically join a carefully selected PRO early in their careers with the understanding that the PRO will license their interests in their songs, monitor usage to detect unauthorized performances, enforce rights, conduct surveys to estimate the frequency with which compositions are performed, and distribute payments.[6]

Collective licensing of public performance rights is not required by law. Rather, it developed as a voluntary solution to the inefficiencies and high transaction costs associated with licensing performance rights to the disparate array of traditional businesses that wish to use music.[7] By licensing works collectively, PROs expand the market for lawful musical performances and reduce transaction costs for both licensors and licensees. Without collective licensing, many copyright owners would have no

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[6] U.S. Copyright Office, *Views of the U.S. Copyright Office Concerning PRO Licensing of Jointly Owned Works* at 26 (Jan. 29, 2016), *available at* https://www.copyright.gov/policy/pro-licensing.pdf ("Songwriters and publishers have . . . indicat[ed] that they carefully choose the PRO with which they affiliate based on their perception of which organization will bring them the most benefit." (footnote omitted)).

[7] *BMI v. CBS*, 441 U.S. at 5 (ASCAP was formed "because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses").

serious prospect of licensing their works broadly in traditional contexts, and many users would have no realistic way to lawfully play music. As the Supreme Court stated in *BMI v. CBS*, "[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided."[8] The DOJ has observed that, "[i]n the United States, non-dramatic performance rights are the only copyrights in musical compositions that are typically licensed collectively, rather than on an individual basis."[9]

C. ASCAP, BMI, and the consent decrees.

ASCAP and BMI, founded in the early 20th century to promote and protect copyright owners, are the largest PROs in the United States.[10] Today, each represents hundreds of thousands of songwriters and millions of copyrights. They compete with two other PROs, SESAC and Global Music Rights ("GMR"), for songwriter business.

More than 75 years ago, the DOJ sued ASCAP and BMI, alleging that their blanket licenses were anticompetitive restraints of trade.[11] At the time, the radio industry was in

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[8] *Id.* at 20; *see also ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 592 (2d Cir. 1990) (noting the "major benefit" of the blanket license); U.S. Copyright Office, *Copyright and the Music Marketplace* (Feb. 2015) at 170, *available at* https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf ("Throughout this study, the Office has heard consistent praise for the efficiencies of blanket licensing[.]").

[9] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, No. 41-cv-1395, at 6 (Sept. 4, 2000).

[10] *See generally BMI v. CBS*, 441 U.S. at 4-5, 10-12 (describing history of ASCAP and BMI).

[11] *Id.*

its infancy, and broadcasters and other music users were believed to be small and lacking in bargaining power or the ability to negotiate directly with more powerful PROs. In 1941, the DOJ's enforcement actions were resolved via perpetual consent decrees.[12] The decrees, which were intended to prevent ASCAP and BMI from abusing their market power notwithstanding the significant procompetitive benefits of blanket licensing, are still in effect today. In their 78-year histories, each decree has been modified only twice. ASCAP's decree was last amended in 2001, and BMI's was last amended in 1994.[13] Because the decrees do not contain provisions providing for "sunset" over time or requiring regular review, there is no guarantee they will ever be changed, even though the music distribution and consumption marketplaces have changed drastically in the last 5-10 years (let alone since 1941).

By the terms of the consent decrees, ASCAP and BMI are required to provide a public performance license to anyone who requests one, and licensees may (and often do) begin using music before royalty rates are negotiated.[14] Although licensees may negotiate performance licenses directly with copyright owners in a free market, they normally take the more favorable, consent decree-regulated licenses from ASCAP and

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[12] *Id.* at 11-12 & n.20 (discussing 1941 ASCAP and BMI consent decrees).

[13] *See* Second Amended Final Judgment, *United States v. ASCAP*, No. 41-cv-1395 (S.D.N.Y. June 11, 2001) ("AFJ2"); Final Judgment, *United States v. BMI*, No. 64-cv-3787 (S.D.N.Y. Nov. 18, 1994).

[14] *E.g.*, AFJ2 § VI (requirement that ASCAP "grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory"); § IX.E (while a license fee is being determined, "the music user shall have the right to perform any, some, or all of the works in the ASCAP repertory to which the application pertains").

BMI. If a user cannot negotiate a royalty rate with ASCAP or BMI, the decrees provide that the user may sue in United States District Court for a judicial determination of the license price.[15] When ASCAP or BMI is brought to "rate court," its songwriters and publisher members bear the costs. Prospective licensees can perform music while the proceedings are pending, and they need not set money aside for the use of music before a rate has been determined.[16]

D. Selective withdrawal is impermissible today.

Beginning in 2013, certain music publishers sought to selectively withdraw from ASCAP and BMI the right to license their compositions as "New Media Transmissions" to "New Media Services," while continuing to allow ASCAP and BMI to license such compositions to traditional public performance licensees. Broadly speaking, these publishers wanted to reclaim their right to license their works directly to digital distributors, while allowing ASCAP and BMI to retain the right to license to traditional users.[17]

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[15] *E.g.*, AFJ2 § IX. This is so even though courts routinely acknowledge that they are poorly equipped to make regulatory pricing determinations. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) ("Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" (citation omitted)); *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) ("How can the court determine this price without . . . acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? . . . . [A]ntitrust courts normally avoid direct price administration . . . .").

[16] *E.g.*, AFJ2 § IX.E.

[17] In April 2011, ASCAP amended its Compendium Rules to provide that "[a]ny ASCAP Member may modify the grant of rights made to ASCAP . . . by withdrawing from ASCAP the right to license the right of public performance of certain New [M]edia Transmissions." *See* ASCAP Compendium Rule 1.12.1 (2014), *available at* https://www.ascap.com/~/media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf. "New Media Transmissions" were defined as including, among other things, digital audio transmissions. *Id.* at Rule 1.12.9. BMI published a

In rate court proceedings later that year, the federal judges responsible for overseeing the ASCAP and BMI consent decrees were asked to decide whether the selective withdrawals were consistent with the consent decrees. Both judges answered that question in the negative.

With respect to ASCAP, Judge Cote ruled that "musical compositions remain in the ASCAP repertory so long as ASCAP retains any licensing rights for them."[18] Judge Cote therefore concluded that copyright owners' purported withdrawals of digital rights from ASCAP "d[id] not affect the scope of the ASCAP repertory" subject to licensing by digital services.[19] Selective withdrawals were ineffective as a matter of law, and ASCAP was required to license digital rights in all the works in its repertory to anyone requesting such a license.[20]

Judge Stanton interpreted the BMI consent decree to mean that when music publishers withdrew their digital rights, BMI could no longer "deal in or license those compositions to anyone."[21] Although the music publishers may have believed themselves

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"Digital Rights Withdrawal Addendum" that defines selective withdrawal in a similar manner.

[18] *Pandora Media, Inc. v. ASCAP*, No. 12-cv-8035, 2013 U.S. Dist. LEXIS 133133, at *20 (S.D.N.Y. Sept. 17, 2013) (internal quotation marks omitted) ("*Pandora v. ASCAP*").

[19] *Id.* at *35-36.

[20] *Id.*

[21] *BMI v. Pandora Media, Inc.*, No. 13-cv-4037, 2013 U.S. Dist. LEXIS 178414, at *11 (S.D.N.Y. Dec. 19, 2013)

to be selectively withdrawing digital rights, they in fact withdrew such compositions from BMI's repertory for all purposes.[22]

These decisions were based on principles of consent decree interpretation, not antitrust or copyright law, and the NMPA takes no position on whether Judges Cote and Stanton interpreted the decrees correctly. Regardless, as argued herein, prohibiting selective withdrawal is wrong and unfair as a matter of antitrust and copyright law and public policy, and the decrees should be modified to expressly permit selective withdrawal.

III. The consent decrees should be amended to permit selective withdrawal.

A. The prohibition on selective withdrawal improperly regulates copyright owners, who were never alleged to have violated antitrust law, while enlarging ASCAP and BMI.

The consent decrees' prohibition on selective withdrawal is a regulation on copyright owners themselves, which lacks any countervailing justification needed to address any anticompetitive threat posed by ASCAP and BMI. The prohibition hinders the ability of music publishers and songwriters to license their public performance rights in a free market and reap the fair value of such rights, but it does not stop or prevent anticompetitive practices by ASCAP and/or BMI. If anything, the prohibition on selective withdrawal enlarges ASCAP and BMI by expanding the scope of rights in their repertories.

Regulating copyright owners in this manner is improper and is inconsistent with the fact that antitrust law is an enforcement mechanism, not a regulatory one.[23] The

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[22] *Id.* at *15.

[23] *See, e.g.*, Assistant Attorney General Makan Delrahim, Remarks at the Am. Bar Ass'n's Antitrust Fall Forum (Nov. 16, 2017), *available at* https://www.justice.gov/

antitrust lawsuits that led to the consent decrees were brought against ASCAP and BMI, not any individual music publisher or songwriter. Therefore, the consent decrees should serve, if anything, as a check on ASCAP and BMI, not as regulations on music publishers, songwriters, and others who were not alleged to have violated the antitrust laws. A consent decree is a contract between the parties to a lawsuit, but music publishers and songwriters were not defendants in the suits against ASCAP and BMI that gave rise to the decrees, they are not parties to the consent decrees, and they should not be regulated by those decrees.[24] To the NMPA's knowledge, the DOJ has never brought any antitrust enforcement action against any music publisher or songwriter relating to public performance rights licensing.

Because the prohibition on selective withdrawal is a regulation on music publishers and songwriters who were never alleged to have violated antitrust law, it is contrary to DOJ policy. The DOJ Antitrust Division Manual states that consent decrees are an appropriate means of resolving enforcement actions to the extent that they "(1) stop . . . illegal practices . . . , (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred."[25] The prohibition on selective withdrawal runs afoul of these guidelines. It does not curtail potential harm to competition

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opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar ("[A]ntitrust law is law enforcement, it's not regulation. At its best, it supports reducing regulation . . . ."); *Excessive Prices* at ¶ 9 ("market pricing . . . is the bedrock of antitrust policy and enforcement in the U.S.").

[24] *Pandora v. ASCAP* at *11 ("[c]onsent decrees 'reflect a contract between the parties (as well as a judicial pronouncement), and ordinary rules of contract interpretation are generally applicable'" (quoting *Doe v. Pataki*, 481 F.3d 69, 75 (2d Cir. 2007))).

[25] Department of Justice, *Antitrust Division Manual* at IV-50 (5th Ed.).

by ASCAP and BMI; it only serves to constrain the behavior of rightsholders who were not alleged to have committed "illegal practices" or other "violation[s]" in the first place. Selective withdrawal should be permitted for this reason alone.

B. Selective withdrawal encourages procompetitive direct licensing while preserving the core efficiencies of the PRO blanket licensing system.

Because of the prohibition on selective withdrawal, music publishers today face an unfair choice when it comes to licensing digital performance rights. On one hand, a copyright owner can withdraw a musical composition from ASCAP or BMI entirely and lose the ability to license such composition through the blanket licenses altogether. This option severely harms the copyright owner's ability to license to traditional licensees at all. On the other, a copyright owner can choose to license all performance rights through a PRO, in which case DSPs can take advantage of World War II-era consent decree provisions never intended for them, such as the provisions concerning rate court proceedings, which the DSPs can use to drain the resources of music publishers and songwriters to obtain better deal terms, all the while using music while such proceedings are pending.

As a practical matter, music publishers did not withdraw from ASCAP and BMI after the 2013 decisions prohibiting selective withdrawal, and it is not clear if they would do so if the prohibition were to continue. However, forcing music publishers into this unfair dilemma is inconsistent with both antitrust and copyright law, each of which favors selective withdrawal. Selective withdrawal both encourages direct licensing where it is efficient to do so (i.e., in the digital streaming market) and maintains the core benefit of the PRO system by continuing to allow ASCAP and BMI to provide performance licenses

to traditional music users, many of which would have no realistic way to play music lawfully without PRO blanket licenses.

1. Selective withdrawal encourages direct licensing of digital performance rights, which is procompetitive and efficient.

If rightsholders were permitted to selectively withdrawal digital rights from ASCAP and BMI, the NMPA believes that there would be an increase in direct licensing between music publishers and DSPs. Direct licensing of public performance rights is generally procompetitive. As the DOJ explained in 2010, "[d]irect licensing between rights holders and users establishes the most effective market-based constraint on BMI's pricing because it places an upper limit on the price that BMI can charge for the blanket license."[26] Today, the ASCAP and BMI decrees ensure that publishers can license directly precisely because direct licensing is a competitive check on the market power of ASCAP and BMI.[27]

Direct licensing between music publishers and DSPs would be efficient. The PRO system was set up in the early 20th century to provide a solution to the practical challenges posed by a licensee market comprised of many thousands of geographically disparate music users. But the DSP market bears no resemblance to that market, and no such practical challenges exist with respect to direct licensing.

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[26] *See* Memorandum of the United States on Decree Construction Issues, No. 1:08-cv-216, Dkt. No. 24, at 2 (S.D.N.Y. Apr. 13, 2010) *available at* https://www.justice.gov/atr/case-document/file/489856/download.

[27] *See, e.g.*, *CBS v. ASCAP*, 620 F.2d 930, 935-36 (2d Cir. 1980) ("[T]he opportunity to acquire a pool of rights does not restrain trade if an alternative opportunity to acquire individual rights is fully available."); *United States v. ASCAP (In re Salem Media of Cal., Inc.)*, 902 F. Supp. 411, 422 (S.D.N.Y. 1995) ("The availability of source or direct licensing has been recognized as a counterweight to ASCAP's bargaining power.").

Streaming dominates the music marketplace today, accounting for 75 percent of music industry revenues as reported by the Recording Industry Association of America.[28] The vast majority of music streamed in the United States is consumed via one of five very large companies – Apple, Amazon, Google/YouTube, Spotify, and Pandora – that individually and collectively dwarf not only every individual music publisher, but the music publishing and songwriting industries as a whole. By some estimates, these five DSPs account for more than 90 percent of music streamed in the United States today.[29] They bring in hundreds of billions in yearly revenue and have a combined market capitalization

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[28] Recording Indus. Ass'n of Am., *Mid-Year 2018 RIAA Music Revenues Report*, *available at* https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report.pdf. Although the NMPA does not maintain data regarding the extent to which streaming accounts for music publishing revenues, the figure is likely less than 75 percent. *See* Ed Christman, *NMPA Announces 11.8% Member Revenue Growth to $3.3B at Annual Meeting* (June 12, 2019), *available at* https://www.billboard.com/articles/business/8515757/nmpa-member-revenue-growth-david-israelite-annual-meeting. The NMPA estimates that approximately 55 percent of music publishing revenues in 2018 were attributable to performance royalties, about 33 percent of which were attributable to digital sources. *Id.* However, streaming also generates non-performance royalties, including mechanical royalties.

[29] *2017 Streaming Price Bible! Spotify per Stream Rates Drop 9%, Apple Music Gains Marketshare of Both Plays and Overall Revenue*, The Trichordist (Jan. 15, 2018), *available at* https://thetrichordist.com/2018/01/15/2017-streaming-price-bible-spotify-per-stream-rates-drop-9-apple-music-gains-marketshare-of-both-plays-and-overall-revenue/; *see also* Russ Crupnick, *While World Awaits iPhone 8, Apple Music Gains Traction with iOS Users*, Music Watch (Sept. 6, 2017), *available at* https://www.musicwatchinc.com/blog/while-world-awaits-iphone-8-apple-music-gains-traction-with-ios-users/; *On the Rise: Steady Growth for Podcasts, Rapid Growth for Smart Speakers*, Edison Research (Mar. 8, 2018), *available at* https://www.edisonresearch.com/infinite-dial-2018/.

that exceeds $2 *trillion*.[30] By contrast, the *entire music publishing and songwriting industries* brought in revenues of $3.33 billion in 2018.[31]

There can be no serious dispute that, unlike the traditional public performance licensees that have been served for decades by ASCAP and BMI, the DSP market is highly concentrated, and each DSP has significant bargaining power and the resources to procure direct licenses from a broad range of rightsholders, as each does today in other unregulated areas. All in all, the drastic shift in market power as between music's creators and its licensees means that certain risks of anticompetitive harm that may have justified the consent decrees in 1941 are not present in 2018 with respect to DSPs, and that the equities squarely favor permitting rightsholders to selectively withdraw their digital rights.

PROs do not generate the same efficiencies with respect to enforcement and monitoring functions in the digital world. The collective enforcement and monitoring services performed by PROs are critical with respect to traditional licensees, as individual music publishers would have little prospect of enforcing their rights against the thousands of businesses across the United States that play music. With respect to digital performance rights, however, a music publisher can enforce its own rights simply by logging in and searching for uses of its works. In 2000, the DOJ foresaw technological developments that would improve the efficiency of direct performance rights licensing and

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[30] In 2018, per their annual reports filed with the SEC, Apple's revenues exceeded $265 billion, Amazon's $232 billion, Google's $136 billion, and Spotify's $5 billion. These companies are presently valued at approximately $905 billion (Apple), $895 billion (Amazon), $820 billion (Google), and $28 billion (Spotify). Earlier this year Sirius XM completed its $3.5 billion acquisition of Pandora.

[31] This estimate is based on revenue figures reported to the NMPA by its members, which include every commercially significant music publisher in the United States. *See* Christman, *supra* n. 28.

obviate the need for collective licensing. In a statement that predated online streaming and the inception of Spotify, YouTube, and so forth, it wrote:

> Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of performance rights by PROs.[32]

Technologies developed in the intervening 19 years do, in fact, permit rightsholders to engage in efficient, direct licensing with DSPs. The consent decrees should be tailored to reflect the current state of technology by removing the prohibition on selective withdrawal.

If there were any doubt that direct public performance licensing between music publishers and DSPs would be efficient, the fact that there exist today well-functioning, direct licensing marketplaces for other, unregulated aspects of copyrights removes it. Today, music publishers routinely license their unregulated rights – such as the rights to synchronize music with video, reproduce lyrics, and produce sheet music – to DSPs on a full-catalog basis, without the involvement of a PRO-like middleman.[33] To be certain, these include the same DSPs – Google/YouTube, Amazon, Apple, Spotify, and Pandora

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[32] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *supra* note 9, at 9 n.10.

[33] *See, e.g.*, *Facebook and Sony/ATV Music Publishing Announce Licensing Agreement*, Variety (Jan. 8, 2018), *available at* https://variety.com/2018/biz/news/facebook-and-sony-atv-music-publishing-announce-licensing-agreement-1202656832/; Roy Trakin, *Rap Genius Signs Deal with Warner/Chappell*, The Hollywood Reporter (July 7, 2014), *available at* https://www.hollywoodreporter.com/news/rap-genius-signs-deal-warner-717005; Adi Robinson, *YouTube Signs Music Licensing Deal with BMG and Eight Other Publishers*, (Jun. 6, 2012), *available at* https://www.theverge.com/2012/6/6/3067636/youtube-music-licensing-deal-bmg.

– that take advantage of the consent decrees in securing rights from ASCAP and BMI in the performance rights space. In the experience of NMPA and its members, direct, free market licensing works well in markets for unregulated aspects of music copyrights and does not pose antitrust concerns. There is no reason to believe that free market licensing of the right of public performance for digital uses would be any different.

Similarly, in the market for recorded music, record labels negotiate licenses directly and in a free market with interactive streaming services. If antitrust consent decrees are not required to regulate the licensing of rights by record labels to DSPs, they likewise should not be required to regulate licensing between music publishers and DSPs. In the United States today, record companies and artists make exponentially more than music publishers and songwriters.[34] The NMPA believes that this disparity is caused by the burdensome regulations, including the prohibition on selective withdrawal, that music publishers and songwriters, but not recording companies and artists, face in the United States. The NMPA believes that if there is to be any disparity between artist pay and songwriter pay, that result should be dictated by the free market and not artificial regulations.

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[34] About 12 cents of every dollar of Spotify's revenues go to music publishers and songwriters via mechanical and performance royalties, while about 59 cents go to sound recording owners. *See* Jordan Bromley, *How Does Music Streaming Generate Money?* (Oct. 12, 2016), *available at* https://www.manatt.com/Insights/News/2016/How-Does-Music-Streaming-Generate-Money. The breakdown is similar with respect to Apple Music, with about 14 cents going to music publishers and songwriters, and 58 cents going to sound recording owners. *Id.* In contrast with the music publishing industry, which, per NMPA data, brought in approximately $2.9 billion in revenue in 2017, the recorded music industry brought in $8.7 billion that year. *See* Joshua Friedlander, *News and Notes on 2017 RIAA Revenue Statistics*, http://www.riaa.com/wp-content/uploads/2018/03/RIAA-Year-End-2017-News-and-Notes.pdf.

Understandably, DSPs would like to be able to continue to rely on the consent decrees, presumably because they believe that free market negotiations will lead to higher prices for digital performance rights. But the prospect of prices negotiated in a free market that properly reflect supply and demand conditions is not a reason to retain the prohibition on selective withdrawal. The antitrust laws exist to protect free markets, not create artificial price controls or otherwise regulate them. As the previous Antitrust AAG, Bill Baer, said: "We don't use antitrust enforcement to regulate royalties. That notion of price controls interferes with free market competition and blunts incentives to innovate."[35] Indeed, the DOJ should approach the question of selective withdrawal from a law enforcement perspective. Unless there is reason to believe that the DOJ could obtain a judgment today that would, as a matter of antitrust law, force copyright owners to license their public performance rights to digital services via ASCAP and BMI – and the NMPA believes that there is none – the prohibition on selective withdrawal should be lifted.[36]

Similarly, the DOJ should reject arguments that the prohibition on selective withdrawal should remain in place because DSPs have built a reliance interest on the ASCAP and BMI consent decrees. The consent decrees were not and could not have

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[35] Assistant Attorney General William Baer, Reflections on the Role of Competition Agencies When Patents Become Essential, Remarks at the 19th Annual International Bar Association Competition Conference at 10 (Sept. 11, 2015), *available at* http://www.justice.gov/opa/file/782356/download.

[36] *See generally* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, William E. Kovacic: An Antitrust Tribute – Liber Amicorum (Vol. 1) (2013) (discussing "regulatory" consent decrees that "place the agency in the position of monitoring or supervising the firm's compliance with remedial obligations or imposing conditions that extend beyond what the agency would likely be able to obtain after successful litigation") *available at* https://www.law.gmu.edu/assets/files/publications/working_papers/1318AntitrustSettlements.pdf.

been written with DSPs in mind. The consent decrees came into existence in an entirely different music marketplace, and DSPs have existed for only small fraction of their history. Although DSPs today are able to take advantage of provisions from the analog radio era, this is purely a fortuity: it has nothing to do with present-day marketplace dynamics or a need for antitrust policing in the digital performance rights space, and is not a reason to leave the prohibition in place.

To the extent that a music publisher or songwriter wishes to selectively withdraw its digital rights and license such rights directly to DSPs, public policy, and antitrust law specifically, supports that course of action.[37] To be certain, copyright owners who do not wish to license directly should not be required to withdraw their digital rights from ASCAP and BMI. But regulations should not prohibit copyright owners' selective withdrawal and allow digital services to exploit the ASCAP and BMI consent decrees, which were developed in the context of an entirely different market, to further their own financial and competitive interests.

2. Selective withdrawal preserves the procompetitive benefits of blanket licensing.

Finally, selective withdrawal maintains the core procompetitive benefit of the PRO system: the collective licensing of public performance rights to traditional licensees. PROs came into existence to collectivize copyright licensing and enforcement functions

[37] Selective withdrawal does not mean that a copyright owner can discriminate between digital licensees. For example, a copyright owner could not withdraw its digital rights from ASCAP for purposes of licensing to Pandora, but not withdraw such rights with respect to Spotify. Selective withdrawal means the withdrawal of a class of rights, and that such rights would have to be licensed directly by any licensee seeking a license for such class.

so that rightsholders could reach a vast assortment of radio stations, clubs, bars, concert venues, and so forth while minimizing transaction costs. PRO blanket licensing remains an efficient way to license public performance rights to traditional licensees; selective withdrawal would not disturb ASCAP and BMI's continuing ability to serve what has been their core function since the early twentieth century, nor would it affect the ability of traditional businesses to procure ASCAP and BMI blanket licenses.

By contrast, if music publishers and songwriters were forced to withdraw their works outright from ASCAP and BMI to guarantee themselves the ability to license digital rights directly to DSPs, these benefits would be lost. Complete withdrawal from ASCAP and BMI would hurt music publishers and songwriters, who would no longer realistically be able to issue licenses to the full scope of traditional licensees. Further, complete withdrawal would also cause substantial harm to large numbers of traditional licensees who have relied on PRO blanket licensing for decades and would no longer be able to freely and lawfully play music without incurring substantial transaction costs.

IV. Conclusion.

We thank the DOJ for thoughtfully revisiting these issues, which are of great importance to the NMPA and its members. For the reasons stated herein, the DOJ should seek to modify the ASCAP and BMI consent decrees to permit selective withdrawal. We would welcome the opportunity to discuss these issues in greater depth in a follow-up meeting with you.

# # #

Exhibits 12-92

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Exhibit 93

NMPA
National
Music Publishers'
Association

975 F Street, NW
Suite 375
Washington, DC 20004
Tel: 202-393-NMPA (6672)

August 27, 2019

Stephen Worth, Esq.
Associate General Counsel, Digital Music
Amazon
2111 7th Ave
Seattle, WA 98121

Re: Royalty Accounting for Prime Music

Dear Stephen:

A number of our music publisher members have expressed concern regarding the manner in which Amazon appears to be calculating royalties under the Section 115 statutory mechanical license for its Prime Music offering. These members have asked that, prior to their taking further action, we reach out to you to request detailed information regarding your method of calculation, as it does not on its face appear to them (or to us) to comply with Section 115 and its implementing regulations.

As you are aware, NMPA, on behalf of its members and all other owners of rights in musical works, sought and obtained modifications to the rates and terms for interactive streaming in the most recent *Phonorecords III* proceeding, and the revised rates and terms are now in effect. These modifications included changes in the manner in which a digital service is to calculate royalties for a bundled subscription offering ("BSO").

Prime Music is a BSO under the regulations, as it is "a Subscription Offering . . . that is made available to End Users with one or more other products or services… as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) or service(s) with which it is made available . . . ." 37 CFR 385.2.

For BSOs, the service revenue prong is calculated as the lesser of total revenues for the bundle and the standalone price for the BSO (or of the most closely comparable offering(s)):

> [T]he revenue from End Users deemed to be recognized by the Service for the [BSO]… shall be the lesser of the revenue recognized from End Users for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are Licensed Activities; provided that, if there is no standalone published price for a component of the bundle, then the Service shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables. 37 CFR 385.2.

Here, the standalone price of Prime Music (or the most closely comparable offering(s)) is, we would assume, less than total Prime revenues, and there is no standalone published price for Prime Music, which cannot be purchased separately from Prime. Thus, the revenue prong for Prime Music must be "the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables."

It is our understanding, based on non-confidential royalty accounting statements delivered by Amazon to statutory compulsory licensors for the use of their musical works on the Prime Music Service, that Amazon is calculating service revenue using a $2.99 comparable price. We are not aware of any offering anywhere in the marketplace priced at $2.99, let alone any offering that can be said to be "the most closely comparable" to Prime Music. We therefore request that you provide detailed information as to how you are calculating Service Revenue for the Prime Music BSO, and what is the basis for such calculations under the controlling regulations, including:

- a list of all offerings that exist in the marketplace that are priced at $2.99/month (or priced at any other rate that Amazon used in calculating Service Revenue for Prime Music);

- whether you used an "average of standalone prices for comparables" and, if so, identify which offerings were used in your average along with their standalone prices;

- the nature of all offerings you used as a comparable (including in any average calculated), including whether the offering is interactive or non-interactive, whether it offers a full catalog or a limited catalog (and, if limited, how is it limited), whether it is a paid subscription offering or an ad-supported offering, etc.;

- the basis for your determination that such offering(s) are "the most closely comparable" to Prime Music.

Further, based on our review of the royalty accounting statements referenced above, it appears that Amazon is not using a mechanical floor prong in its calculations of Prime Music royalties. In connection with instituting the above bundle revenue provision in the Amended Order Granting in Part and Denying in Part Motions for Rehearing dated January 14, 2019 ("Rehearing Order"), the judges explained a connected change to the mechanical floor for BSOs:

> As a consequence of the Judges' adoption of the foregoing approach, the Judges will also dispense with the separate royalty floor for [BSOs] [formerly 25 cents per user]. Because the applicable revenue will be the same as though the bundle were a standalone music offering, the royalty floor will be the royalty floor that would apply to the music component of the bundle if it were offered on a standalone basis. (Rehearing Order at 19)

37 CFR 385.22 thus provides:

> In the case of a [BSO], the royalty floor… is the royalty floor that would apply to the music component of the bundle if it were offered on a standalone basis…

Prime Music is available from portable devices, and thus, on a standalone basis, it falls under the Standalone portable Subscription Offering mechanical floor (the "Portable Floor"), which is 50 cents per subscriber per month. (37 CFR 385.22(a)(3)). Yet, Amazon does not appear to have used the Portable Floor in performing its royalty calculations in its Prime Music accountings. Please let us know if this was purely an oversight. If it is not, then please explain Amazon's basis for omitting the Portable Floor in its Prime Music accounting.

We remind that 37 CFR 210.16 requires that, for offerings subject to a percentage rate royalty structure, the monthly statement of account "include a detailed and step-by-step accounting of the calculation of royalties under [the applicable provisions of part 385 of title 37], sufficient to allow the copyright owner to assess the manner in which the licensee determined the royalty owed and the accuracy of the royalty calculations . . . ." As discussed herein, it is our understanding that Amazon's current accountings under this regulation do not satisfy its requirements, as the monthly statements do not allow copyright owners to assess "the manner in which Amazon determined the royalty owed and the accuracy of the royalty calculations." We further remind that the monthly statements under the compulsory license be certified under oath that calculations are "true, complete, and correct" to the best of knowledge, information, and belief, and are made in good faith.

We believe that it is important that all digital services calculate statutory mechanical royalties not only accurately and in accordance with the regulations, but also in a transparent manner and in a manner that is uniformly applied to all copyright owners whose works are licensed on a compulsory basis. We trust that Amazon shares this belief, and thus will have no issue with providing the information requested in this letter, which information will provide copyright owners with the requisite transparency into Amazon's Prime Music royalty calculations. We also trust that Amazon will correct any errors in its calculations or methodology that are identified and will promptly reimburse copyright owners if any underpayments have been made to date.

We respectfully request that you provide the information requested herein by September 9, 2019.

Very truly yours,

Danielle M. Aguirre
Executive Vice President & General Counsel
National Music Publishers' Association

cc: David Israelite, President & CEO, National Music Publishers' Association
NMPA Board of Directors

Exhibits 94-108

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Exhibit 109

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Exhibit 110

Exhibit Intentionally Omitted

Exhibit 111

Exhibit Intentionally Omitted

Exhibit 112

Exhibit Intentionally Omitted

Exhibit 113

Exhibit Intentionally Omitted

Exhibits 114-124

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Exhibit 125

Exhibit Intentionally Omitted

Exhibits 126-134

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Exhibit 135

Exhibit Intentionally Omitted

Exhibits 136-204

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Proof of Delivery

I hereby certify that on Wednesday, October 20, 2021, I provided a true and correct copy of the PUBLIC Written Direct Statement of Amazon.com Services LLC (Volume III - Exhibits) to the following:

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Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Signed: /s/ Joshua D Branson